

MEMO

To: Wind Energy Task Force
From: Orlando E. Delogu, Emeritus Professor of Law
University of Maine School of Law
Subject: **A Necessary Strategy for Siting Wind Energy Facilities**
Date: September 26, 2007

Introductory Note:

Some time before the Land Use Regulatory Commission's decision denying Redington Wind Farm's original rezoning application, and long before the Governor established the Wind Energy Task Force, this writer published (in the *Maine Lawyers Review*¹) a three-part series of articles arguing that the LURC statute itself, and the agency's implementing regulations, policies, and overall attitude towards new types of, and larger-scale, development in the 10.4 million acres of land subject to LURC jurisdiction was (and remains) unduly restrictive.² The publication of these views was triggered by LURC's June 7, 2006 decision (and its published rationale) denying Burnt Jacket LLC's rezoning application to develop 70 homes in the Town of Beaver Cove.

In the conclusion of the three-part series I expressed the view that this combination of factors (statute, regs., policies, and agency mind-set), "...constitutes an over-regulation of this land, an abuse of police power, a 'taking' of the landowner's property right."

My views in this regard have not changed in the intervening year. However, this memo is not drafted to urge a general review/overhaul of the (now more than 35-year old) LURC statute and/or LURC's regulations, policies, or implementing practices. That may well be both necessary and appropriate, but that is the work of another body (a different task force, the Legislature, the Courts) on another day. This memo focuses only on the tasks of the Wind Energy Task Force, and specifically the siting needs of commercial sized (as opposed to community based) wind energy facilities.

¹ The articles appeared in the August 3, 2006, August 24, 2006, and September 7, 2006 issues of the MLR).

² I have provided Alec Giffen (in both hard copy and electronic format) the complete text of these articles. I trust these materials will be made available to Task Force members and to interested members of the public.

It is certainly true that my views with respect to LURC's restrictive approach to most large-scale development dictates (in part) the strategy I think necessary to site needed wind energy and transmission line facilities. A LURC more hospitable in general to a wide range of development types and facilities might not require the approach to siting wind energy facilities recommended in this memo— but that is not the LURC we are dealing with. In fairness to LURC, however, it must be recognized that though many wind energy development sites are in the unorganized territory, not all such sites are in LURC's jurisdiction. Developers with potential sites in organized towns must first deal with (often unpredictable) local planning approval processes, and then with the DEP's regulatory process. And finally, our present approach to wind energy facility siting does not adequately take into account the transmission line needs that a particular site may pose. Neither LURC nor the DEP can regulate and/or order the construction of needed transmission line facilities. Only the PUC has such authority (and they are not at present a part of the wind energy facility siting process). The developer is free to tackle his own transmission line needs (obtaining regulatory approvals and bearing the costs of same), but at some point this becomes prohibitively time consuming and costly— otherwise viable wind energy sites (in both organized and unorganized areas) will not be built because it's not economically feasible to get the energy from the site to the larger energy grid. In short, overcoming LURC's aversion to large-scale development, and (equally important) overcoming this regulatory fragmentation (the division of wind energy siting responsibilities between local governments, LURC, the DEP and the PUC) dictates the need for the approach advocated in this memo.

A Wind Energy (and Transmission Line) Siting Authority:³

In a nutshell, what is advocated for commercial sized wind energy facilities (including needed transmission lines) is a single regulatory entity with state-wide jurisdiction. This Authority would centralize in one entity regulatory powers now split between three (or more)

³ It would seem appropriate to clothe this Authority with jurisdiction to site facilities providing energy from any and all other sources of alternative or renewable energy, i.e., biomass materials, hydrological or tidal sources, thermal or solar sources— even though these types of generating facilities are less likely (than wind energy facilities) to be developed in Maine.

regulatory entities, i.e., local governments with their own unique agendas, LURC (with jurisdiction of wind energy facilities in the unorganized territory), the DEP (with jurisdiction over such facilities in organized areas), and the PUC (with statewide jurisdiction over transmission lines).

A case can certainly be made that this Authority ought to be a new stand-alone (3 or 5 member) body— a body untainted by any historical missions and/or biases with respect to development and/or wind energy siting – a body free of the geographical and/or subject matter limitations that LURC, the DEP, and the PUC all labor under. If this is the direction that the Governor and Legislature are inclined to move in, I can live with that. But in a setting where state government is already too fragmented; where the political and monetary costs of setting up a new agency (passing the necessary legislation, funding the Authority, choosing its leadership, gearing up for the siting work that needs to be done) could take months or years, it seems more appropriate to this writer to simply expand the jurisdiction of the PUC (the one agency of the three that already has both energy expertise and statewide jurisdiction) to encompass, beyond the present range of PUC responsibilities, the full range of wind energy facility (and transmission line) siting and regulation.

The PUC has respected leadership; it has a sophisticated technical staff (that would need to be augmented only slightly to accommodate wind energy responsibilities); it has a budget and office space (both of which may need to be expanded somewhat); it has counsel that understands complex and technical energy issues; it has long experience in conducting complicated hearing processes. In short, it is the agency best suited to handle commercial wind energy siting proposals— and it will almost certainly be able to gear up to the full measure of the tasks at hand in the shortest time and at least cost. The PUC would continue to be characterized as the PUC when it is conducting any and all of its present range of regulatory responsibilities; it would be designated The Wind Energy Siting Authority when it is dealing with any aspect of wind energy development, including the expansion of needed transmission lines to accommodate this (or any other) renewable energy source.

In order to assure that the Authority will fully and adequately take into account LURC comprehensive planning and development regulations, the full range of DEP monitored state environmental laws, and (when proposed facilities are located in a municipality) the full range of local concerns, it seems appropriate to clothe these respective agencies/governments with

intervener status in any wind energy facility or transmission line siting hearing held by the Authority. Alternatively, the LURC chairman, the Commissioner of the DEP, and the head of the local government (or their designated appointees) could sit as ex-officio (non-voting) members of the Authority when any wind energy hearing is being conducted that implicates the DEP's or LURC's interests or the interests of a particular local government. In this position these ex-officio members of the Authority should be given leave to introduce (through their own technical staff) any issues that they deem relevant to the siting issue at hand. They should also be invited to offer their recommendation as to the disposition of the matter at hand, and/or to recommend any conditions of approval that they think appropriate. **But all final decisions would rest with the Authority.** Site approval by the Authority of a commercial wind energy facility (and/or needed transmission lines), albeit with reasonable development conditions suggested by LURC or a local government and/or environmental regulation conditions suggested by the DEP, would be in lieu of any and all presently applicable local government, LURC, or DEP permitting, rezoning, and site approval processes. Decisions of the Authority would, of course, be subject to judicial review as are all final decisions of Maine agencies.

With respect to the transmission line powers of the Authority, it would seem appropriate for the Authority to be able not only to site such facilities (overcoming local government, LURC, or DEP resistance), but to actually bring them on line. As already noted (see pg. 2) if commercial wind energy developers (acting alone) must also build lengthy transmission lines to get the energy produced onto the grid, many viable wind energy sites will never be developed. Three options should be available to the Authority: 1. The Authority could build the transmission line itself and then license its use, maintenance, and upkeep to private sector entities—a wind energy facility developer, existing owners of transmission lines, e.g., CMP or Bangor Hydro, etc.; 2. The Authority could order CMP or Bangor Hydro (and perhaps others operating transmission line facilities in the state) to build needed transmission linkages from proposed wind energy sites to the larger energy grid system; and 3. The Authority could allow (and facilitate) a wind energy developer at a particular site or sites to build necessary transmission lines with the added incentive(s) that the Authority would, if necessary, acquire by eminent domain (and transfer to the developer at cost) needed right-of-way/transmission line corridors,⁴ and that the total cost of

building these facilities would be recoverable from both original users and those who subsequently tie into the now built transmission line. These latter two powers (eminent domain, and cost sharing among all ultimate users of a transmission line facility) must also be available to the Authority itself if it builds a transmission line facility (option #1, above), or if it directs CMP or some other transmission line provider (option #2 above) to build such a facility.

You will note that I have left small-scale community based wind energy facilities (however these may subsequently be defined) outside of the scope of the recommendation presented. It is not that these facilities are unimportant to the developer and/or to the community in which they are sought to be placed. But for now at least their individual and aggregate significance does not warrant lifting critical siting decisions to the state level of government— out of the hands of the respective local governments involved. When this is no longer true, we can revisit the siting needs of these community based facilities. Perhaps the only step that could be taken now is one that would prohibit municipalities from altogether barring small scale community based wind facilities— they can regulate, but not prohibit. And some of the unintended barriers to these facilities could be removed, e.g., PUC case law, regulations, or orders— zoning height limitations, etc.

Finally, the Mars Hill experience suggests that facilities large (commercial size) or small should be amenable to a range of mitigating steps/measures, certainly when the need for them is apparent at the outset of the site approval process, but also when that need only becomes apparent once the facility is operational. Such steps as requiring an adequately sized parcel for the particular facility, the fashioning of adequate setbacks from parcel boundary lines, the installation (when needed) of adequate visual and sound deflection berms, structural barriers, vegetative materials, etc. If what many regard as unsightly can be reasonably and adequately screened, wind energy facilities should be compelled to do so. If we can engineer the sound of turnpike noises away from nearby residences we can do the same for unacceptable noise from a wind energy facility. And finally, the installation of noise suppressing equipment (if and when it becomes available at reasonable cost) should be considered to mitigate externalities arising from such facilities. This list could undoubtedly be expanded, but the point is adequately made. Mitigation of harms emanating from wind energy (and transmission line) development should be a part of the site review process and subsequent regulation of operational facilities.

Conclusion:

We must ask ourselves—how serious are we about renewable energy in general, and wind energy in particular? Many are not serious at all. Most forms of renewable energy (certainly wind energy and needed transmission line facilities) have become classic NIMBY's— we like the idea, but not here, not there, and ultimately, almost nowhere. The original Redington proposal was vigorously opposed, and in spite of a 100 page LURC staff report supporting the needed zoning change, it was overwhelmingly rejected by the LURC board. A scaled down version of Redington (also vigorously opposed) is presently being considered by LURC— its fate is unknown at this time. But at the same time, recent polls suggest that most of our fellow citizens are serious— they support wind energy development in Maine. They realize that renewable energy, wind energy, will never be a complete substitute for energy derived from fossil fuels. But they see wind energy as part of a mix of renewable energies that will soften global warming impacts attributable in large measure to unrelenting, and increasing, burning of fossil fuels. They are prepared to accept the relatively minor environmental impacts that wind energy facilities give rise to in exchange for a slowing down of the far more damaging consequences that continued reliance on fossil fuels and global warming portend. It is a trade off that most economists, most scientists would readily make.

The Governor is also serious about renewable energy—wind energy in particular. That's why this Task Force was created. Read the Executive Order again— particularly the “whereas” clauses that precede the actual formation of this body. These clauses for the most part state facts that are not seriously disputed— facts that the Task Force needs to keep in mind in fashioning recommendations to the Governor and Legislature: “wind power is the fastest growing utility-scale source of renewable energy in the world”... “Maine has the highest wind potential of any New England state and ranks 19th in terms of wind potential in the United States as a whole”... “wind power does not generate greenhouse gases and is broadly viewed as having fewer environmental impacts than other forms of electrical power generation”... “wind power development can provide short term and long term economic and employment benefits for Maine citizens.” The Governor's Order goes on to lay out a series of Task Force duties— the first two call upon this body to, “Examine the regulatory process ... identify barriers to wind power development Identify and recommend any changes deemed beneficial for assuring that Maine has a balanced, efficient ... regulatory framework for evaluating wind power projects.

That is precisely what this brief memo has attempted to do. The barriers to wind power development include LURC's mind-set, its bias against any type of large scale industrial type development in the unorganized territory, no matter how important that development may be to national and/or state energy policies. But an equally (perhaps even more) important barrier is the fragmentation of siting authority for wind energy and related transmission line facilities. As suggested earlier in this memo, the division of siting responsibilities for wind energy and related transmission line facilities between local governments, LURC, the DEP and the PUC is stifling the development of this industry— it must be ended. A Wind Energy (and Transmission Line) Siting Authority with state-wide jurisdiction for siting commercial sized wind energy facilities is proposed. The existing three member PUC is selected to be the agency wearing this additional hat. For the reasons laid out above, it seems the most logical choice, though a new stand alone body with responsibilities similar to those conferred on the Authority is certainly a possible alternative. Whether the Authority's responsibilities are reposed in the PUC or in a wholly new agency, the powers outlined seem minimally necessary if national and state energy policies, as well as the Governor's objectives are to be realized.

Finally, I would note that continuation of present wind energy siting policies which are too fragmented, rely too much on LURC decision making, and which fail to see that wind energy development and transmission line development are inextricably linked will almost certainly not produce the level of wind energy development that we need, that the Governor and the people of Maine are looking for. A continuation of present policies will (in my judgment) leave the promise of this industry largely unfulfilled. On the other hand, a sharp break with the past— the creation of a single wind energy siting Authority is an approach that both cures present defects and offers an exciting upside potential. I would urge the Task Force to recommend something along these lines to the Governor and the Legislature. The time is ripe.